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Case Number 90-1792

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA

OCTOBER TERM, 1991

The State of OHIO, EX REL. Richard G. JOHNSON, Esquire,

Petitioner,

-vs-

The Honorable Terrence O'DONNELL, Judge,

Prudential-Bache Securities, Inc.,

-and-

Jay H. Salamon, Esquire,

Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Ohio

Reply Brief in Support of the Petition for a Writ of Certiorari

•**Richard G. Johnson, Esquire,** *Counsel Pro Se of Record,* 11477 Mayfield Road, Suite 814, Cleveland, Ohio 44106-5906, 216/229-6777 *telephone*, 216/229-1447 *facsimile*, *Petitioner Pro Se.*

Dated: July 22, 1991

A. THE QUESTIONS PRESENTED FOR REVIEW

[Omitted.]

B. THE PARTIES

[Omitted.]

C. THE TABLE OF CONTENTS

A. THE QUESTIONS PRESENTED FOR REVIEW i

B. THE PARTIES i

C. THE TABLE OF CONTENTS ii

D. THE TABLE OF AUTHORITIES vi

E. THE OFFICIAL AND UNOFFICIAL REPORTS 2

F. THE STATEMENT OF JURISDICTION 2

G. THE CONSTITUTIONS AND STATUTES INVOLVED 2

H. THE STATEMENT OF THE CASE 3

I. THE REASONS FOR GRANTING THE WRIT 5

I. The Introduction 5

- Overview of Procedural Due Process and the applicability thereof to this Case 5

II. The Argument 5

1. Every litigant in the State of Ohio has a statutory right of appeal in the first instance from the final order(s) of any trial court. The State of Ohio provides an appellate process for *every* such litigant except for litigants commencing original actions in the Supreme Court of Ohio—even though an appellate process therefrom is possible. The result of a lack of an appeal process is a *per se* violation of procedural due process for such litigants, because they are denied their right to an appellate hearing; more-

over, the larger policy implication is that such litigants are denied any state forum to raise federal questions arising from such final orders of the Supreme Court of Ohio, which thus forces such litigants to raise these federal questions for the first time in this Court..... 5

2. The Petitioner has a substantive right under Ohio law to an impartial adjudication of his legally cognizable claims. The Petitioner has the same procedural due process right as guaranteed by the fourteenth amendment to the Constitution. All authorities agree that the judgment of a partial tribunal is void or voidable; however, what constitutes partiality has hardly begun to be fleshed out by the courts, and such reported cases usually deal with *ex ante* reasons for disqualification. This Case presents the issue of what to do with *ex post* reasons for disqualification; here, the partiality arose from the entirely bizarre and totally unfounded dismissal, *sua sponte*, by the Supreme Court of Ohio of the Petitioner's Case. Judicial ethics experts agree that this type of conduct represents disqualifiable partiality. As such, the Petitioner was denied his procedural due process right to a fair trial by the Supreme Court of Ohio 7

3. The Supreme Court of Ohio considered this Case below on the merits; however, the Supreme Court of Ohio has refused to enter a judgment for or against the Petitioner. Instead, the Supreme Court of Ohio dismissed the Case below, and it has so far refused—in violation of Ohio law—to explain its reasons therefor. This conduct, *per se*, denied the Petitioner his procedural due process right of access to the courts as guaranteed by the fourteenth amendment to the Constitution..... 10

III. The Conclusion 12

J. THE APPENDIX ..... A
I. Relator's Reply Brief, at 9-18 ..... B

D. THE TABLE OF AUTHORITIES

CASES—

- *Boddie v. Connecticut*, 401 U.S. 371 (1971) 10
- *Cooke v. Kinney*, 65 Ohio St. 2d 7, 417 N.E.2d 106 (1981) 6
- *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982) 10
- *Ohio Furniture Co. v. Mindala*, 22 Ohio St. 3d 99, 488 N.E.2d 881 (1986) 9
- *Societe Internationale v. Rogers*, 357 U.S. 197 (1958) 10
- *State v. Nickles*, 159 Ohio St. 353, 112 N.E.2d 531 (1953) 6

RULES—

- FED. R. SUP. CT. 8.2 9
- FED. R. SUP. CT. 16.1 11

SECONDARY RESOURCES—

- 2 OHIO DIGEST *Appeal and Error* § 1 (1980 & Supp. 1991) 6
- 4 OHIO JUR. 3D *Appellate Review* §1 (1978 & Supp. Jun. 1991) 7
- WHITESIDE, OHIO APPELLATE PRACTICE *Text* 1.18 (1987) 6

STATUTES—

- OHIO REV. CODE ANN. § 2505.02 (Baldwin 1991) 7

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Dated: July 22, 1991

E. THE OFFICIAL AND UNOFFICIAL REPORTS

[Omitted.]

F. THE STATEMENT OF JURISDICTION

[Omitted.]

G. THE CONSTITUTIONS AND STATUTES INVOLVED

[Omitted.]

H. THE STATEMENT OF THE CASE

The Petitioner objects to the Intervening Respondents' Statement of the Case contained in their Joint Brief in Opposition. Their entire statement is totally irrelevant. Moreover, their Statement does not reflect the Record in this Case—but rather represents their version of the facts condensed out-of-context. In essence, what the Intervening Respondents have sought to do is to paint the Petitioner as a bad person, who thus does not deserve due process. The Petitioner has already moved this Court to strike their Joint Brief on this basis. The Intervening Respondents make these sort of attacks as a matter of course. And each time that the Intervening Respondents have taken jabs at the Petitioner, he has knocked their blocks off. Every quote that they have taken out of context in an attempt to vilify the Petitioner was made in defense to previous assaults by them. And they never seem to stop. If this Court is further interested, it may review the Petitioner's last defense against the Respondents as contained in his Reply Brief below. Section J. Appendix-I., p. B.

While it does not matter what the Case below was about, the Petitioner will give *his encapsulated version* in addition to the partial reproduction in this Appendix.

What this Case below is about is power and liability. In the trial court, the attorneys for the Intervening Respondents failed to answer or otherwise defend the action within rule day. Instead, they had their secretary prepare, sign, and file a motion for an extension of time in which to answer. When the Petitioner found out, he moved to strike the motion and enter a default judgment. The Intervening Respondents defended that this was a common and accepted practice among busy Cleveland attorneys, and they have admitted that they have done likewise in other situations. On this information, the Petitioner moved to refer that counsel to the disciplinary process. The Intervening Respondents response was to ask Judge O'Donnell to sanction the Petitioner on the basis of the literal ethical violations. Judge O'Donnell was only too happy to oblige without even taking the time to hold an evidentiary hearing as required under

the Ohio statute. Basically, the thrust of this entire episode was that the Petitioner should stop "picking on" the Intervening Respondents.

The Respondents chose the wrong person to underestimate.

In Ohio, there are no Ohio Supreme Court opinions regarding Civil Rule 11 or Disciplinary Rule 1-103. For some reason, the Supreme Court of Ohio chose not to write an opinion in this Case below—which squarely offered it the opportunity to expound on an important area of the law. In the Petitioner's opinion, the Supreme Court of Ohio cannot write an opinion which sanctifies having legal secretaries prepare, sign, and file motions. Nor could that court sanctify a trial court's refusal to refer an attorney to the Bar when that attorney admits to a pattern of unethical conduct. That is why they chose to write nothing. (Under the Intervening Respondents view of the Petitioner, one would think that the Supreme Court of Ohio would have been only too happy to write an opinion showcasing his sanctionable conduct.)

Apart from the exciting ethical issues raised below, this Case had practical side-effects. In Ohio, the mandatory law is that without an answer, civil rule 12 motion, or motion for an extension of time, a trial court is required to enter a default judgment. To get out of a default judgment, a defendant must show excusable neglect. Suffice it to say, under Ohio law, an intentional direction to a legal secretary to file a fraudulent motion for an extension of time would not constitute excusable neglect on the part of the Intervening Respondents. Under a literal application of Ohio law, the Petitioner should have been awarded a default judgment—which would have created malpractice liability for the attorneys for the Intervening Respondents—which thus explains their continued pattern of unethical conduct as evidenced by their successive attacks upon the Petitioner.

In the Petitioner's opinion, as recited above, this Case is about money, power, liability, and the ability of an established law firm to affect the behavior of an elected county judge.

I. THE REASONS FOR GRANTING THE WRIT

On or about May 20, 1991, the petitioner, Richard G. Johnson ("Petitioner" or "Relator" or "Johnson"), filed a Petition for a Writ of Certiorari with this Court against the respondents, the Honorable Terrence O'Donnell, Judge ("Respondent"), Prudential-Bache Securities, Inc. ("Prudential-Bache"), and Jay H. Salamon, Esquire ("Salamon") (collectively "Intervening Respondents") (as a group "Respondents"). On or about June 11, 1991, the Intervening Respondents moved this Court for an extension of time in which to file their brief in opposition. On or about June 13, 1991, this Motion was GRANTED by this Court's Clerk. On or about June 13, 1991, the Petitioner filed an Objection to this Motion. On or about June 17, 1991, Justice John Paul Stevens DENIED the Petitioner's Objection. On or about July 18, 1991, the Intervening Respondents filed their Joint Brief in Opposition. On or about July 19, 1991, the Petitioner filed a Motion to Strike that Joint Brief in Opposition.

I. **The Introduction—**

- **Overview of Procedural Due Process and the applicability thereof to this Case—**

[No reply needed.]

II. **The Argument—**

1. **Every litigant in the State of Ohio has a statutory right of appeal in the first instance from the final order(s) of any trial court. The State of Ohio provides an appellate process for *every* such litigant except for litigants commencing original actions in the Supreme Court of Ohio—even though an appellate process therefrom is possible. The result of a lack of an appeal process is a *per se* violation of procedural due process for such litigants, because they are denied their right to an appellate**

> **hearing; moreover, the larger policy implication is that such litigants are denied any state forum to raise federal questions arising from such final orders of the Supreme Court of Ohio, which thus forces such litigants to raise these federal questions for the first time in this Court—**

In their Joint Brief in Opposition, the Intervening Respondents stated that

> [c]ontrary to [the] Petitioner's major premise, the statutory provision relied upon by [the] Petitioner does not create a right of appeal from every final order, judgment or decree. It merely says that such rulings may be reviewed on appeal by whichever of the three state courts—common pleas, court of appeals, or supreme court—has jurisdiction to hear such an appeal.

Intervening Respondents' Joint Brief in Opposition, at 9.

The Intervening Respondents then went on to state that no Ohio court has appellate jurisdiction over the Supreme Court of Ohio. *Id.* They also threw-in the "slippery-slope" argument that the Petitioner's argument would lead to continuous appeals. *Id.* Finally, the Intervening Respondents stated that the Petitioner had waived this alleged error by initiating his claims in the Supreme Court of Ohio. *Id.* at 10.

The Petitioner must note that the Intervening Respondents have not cited any authority in support of their entire argument. All they have done is cite two statutes.

First, the Statute clearly creates a right of appeal from any trial action. *See, e.g., Cooke v. Kinney*, 65 Ohio St. 2d 7, 417 N.E.2d 106 (1981); *State v. Nickles*, 159 Ohio St. 353, 112 N.E.2d 531 (1953); *see generally* WHITESIDE, OHIO APPELLATE PRACTICE *Text* 1.18 (1987) (right to appeal); 2 OHIO DIGEST *Ap-*

peal and Error § 1 (1980 & Supp. 1991) (listing cases on point); 4 OHIO JUR. 3D *Appellate Review* §1 (1978 & Supp. Jun. 1991) (discussing history of the right to appeal). The term "may" means that one cannot be forced to appeal if one chooses not to exercise that right (this is a standing constraint).

Second, just like an identity function, the Supreme Court has jurisdiction over itself.

Third, the "slippery-slope" argument does not work because the actions of an appellate court on review do not come within the definition of a final appealable order. OHIO REV. CODE ANN. § 2505.02 (Baldwin 1991).

Finally, the Petitioner did not waive his right to appeal by exercising his right to access the Supreme Court of Ohio. Under the Intervening Respondents' theory, whenever a litigant made a conscious choice to use a procedurally defective system, s/he would have waived his/her objections thereto. However, without recourse to such a system, such a litigant would have no standing to challenge the alleged inadequacy—a real Catch-22.

2. **The Petitioner has a substantive right under Ohio law to an impartial adjudication of his legally cognizable claims. The Petitioner has the same procedural due process right as guaranteed by the fourteenth amendment to the Constitution. All authorities agree that the judgment of a partial tribunal is void or voidable; however, what constitutes partiality has hardly begun to be fleshed out by the courts, and such reported cases usually deal with *ex ante* reasons for disqualification. This Case presents the issue of what to do with *ex post* reasons for disqualification; here, the partiality arose from the entirely bizarre and totally unfounded dismissal, *sua sponte*, by the Supreme Court of Ohio of the Petitioner's Case. Judicial ethics experts agree that this**

type of conduct represents disqualifiable partiality. As such, the Petitioner was denied his procedural due process right to a fair trial by the Supreme Court of Ohio—

At no time during this Case's tenure before the Supreme Court of Ohio did more than one justice vote to sanction the Petitioner. The first occasion was Justice Resnick's single vote to sanction the Petitioner. Petition, at section J. Appendix-II., pp. C-D. Apparently, Justice Resnick later changed her mind. The second and last occasion was Justice Douglass's single vote to *sua sponte* sanction the Petitioner. *Id.* at Appendix-VI., pp. I-J. Apparently, Justice Douglass also changed his mind. While the Petitioner is not proud of these instances, all he can say is that when a litigant is truly zealous, s/he risks the chance of being considered to have crossed the grey line of acceptable conduct and of being exposed to sanctions. But the plan fact remains that the issue of sanctions was fully litigated the first time, and on each occasion, the nearly-unanimous Supreme Court of Ohio decided that the Petitioner was operating within the bounds of acceptable litigation conduct.

Despite the above, the Intervening Respondents' argument is that this Court should first *assume* that the Supreme Court of Ohio *sua sponte* dismissed the Petition below as a sanction for *supposed* misconduct on the part of the Petitioner. Second, the Intervening Respondents would have this Court believe that a court has inherent power to *sua sponte* dismiss cases without prior notice to the affected party.

At this point the Petitioner must note that every vicious attack made by the Intervening Respondents is unsupported by the Record in this Case or taken wildly out-of-context. That is why they have provided no citations to the Record. Since the Petitioner has already moved to strike the Joint Brief on this basis, he sees no reason to revisit the issue now. He simply repeats his objection.

First, the voting record in this Case clearly reveals that the issue of sanctions was fully reviewed and that they were denied against all of the Parties. The Petitioner simply has no idea how the

Intervening Respondents can make up their own version of reality and postulate it to this Court as if it were true. Such conduct goes so far beyond acceptable levels of litigation that the Petitioner leaves it up to this Court to determine whether or not discipline is warranted. FED. R. SUP. CT. 8.2.

Second, assuming *arguendo* that the Supreme Court of Ohio has inherent power to *sua sponte* sanction litigants, and assuming *arguendo* that the Supreme Court of Ohio did sanction the Petitioner *sub silentio*, and assuming *arguendo* that the Supreme Court of Ohio did not have to apply the doctrine of measured and progressive responses, the Supreme Court of Ohio still was constrained by the doctrine of procedural due process to give the Petitioner prior notice of its intention and an opportunity to rebut such a charge. And the Supreme Court of Ohio knows this.

The Supreme Court of Ohio has previously

> h[eld] that the notice requirement of Civ. R. 41 (B) (1) applies to *all* dismissals with prejudice, including those entered pursuant to Civ. R. 37 (B) (2) (c) for failure to comply with discovery orders. A dismissal on the merits is a harsh remedy that calls for the due process guarantee of prior notice.
>
> . . .
>
> This holding stems from and reflects "a basic tenet of Ohio jurisprudence that cases should be decided on their merits." Notice of intention to dismiss with prejudice gives the non-complying party one last chance to obey the court order in full. The moving party should not be allowed to circumvent this protection by simply framing his motion in terms of a Civ. R. 37 sanction. Nor should a trial court on its own motion dismiss on the merits without prior notice.

Ohio Furniture Co. v. Mindala, 22 Ohio St. 3d 99, 101, 488

N.E.2d 881, 883 (1986) (emphasis in original; citation omitted).

To repeat yet again for the Intervening Respondents, the doctrine of procedural due process places "'constitutional limitations upon the power of courts, even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits . . . .'" *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429 (1982) (quoting *Societe Internationale v. Rogers*, 357 U.S. 197, 209 (1958)) (applying the fifth amendment). "*Similarly, the [f]ourteenth [a]mendment's Due Process Clause has been interpreted as preventing the [s]tates from denying potential litigants use of established adjudicatory procedures, when such an action would be 'the equivalent of denying them an opportunity to be heard upon their claimed right[s].*'" *Id.* at 429-30 (emphasis added) (quoting *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971)). As discussed in subsection two of the Petition, there is a federal procedural due process right to a fair trial—a component of which is that the tribunal is required to follow the mandatory law of the jurisdiction.

Finally, the Petitioner must note his erratum on page 21 of his Petition. The second full paragraph should read as follows:

> The remedy is to vacate the judgment entry of dismissal entered by the Supreme Court of Ohio, to remand this Case for an impartial merit determination, and to disqualify the ~~six~~ FIVE ~~(6)~~ (5) members of the Supreme Court of Ohio who became partial in this Case. *See Aetna Life Ins. Co.*, 475 U.S. at 827-8; *Ward*, 409 U.S. at 57, 60; *In re Murchison*, 349 U.S. at 137-9; *Tumey*, 273 U.S. at 522-35.[1]

Petitioner's Petition, at 21 (footnote renumbered).

3. The Supreme Court of Ohio considered this Case below on the merits; however, the

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[1] Justice ~~Brown, who did not participate below,~~ HOLMES would then become the acting chief justice and would appoint a replacement for each of the disqualified justices. OHIO CONST. art. IV, § 2 (A).

> **Supreme Court of Ohio has refused to enter a judgment for or against the Petitioner. Instead, the Supreme Court of Ohio dismissed the Case below, and it has so far refused—in violation of Ohio law—to explain its reasons therefor. This conduct, *per se*, denied the Petitioner his procedural due process right of access to the courts as guaranteed by the fourteenth amendment to the Constitution—**

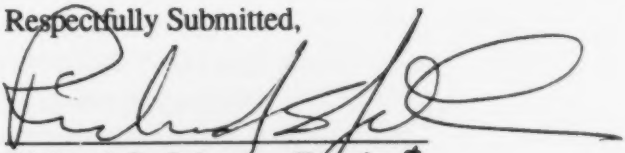
The fact that Justice Holmes voted to deny the Petition below is conclusive proof of the fact that the Supreme Court of Ohio considered the merits of this Case below and voted thereon. Petitioner's Petition, at section J. Appendix-VI., pp. I-J.

Since the Intervening Respondents are indifferent to this Question Presented, Intervening Respondents' Joint Brief in Opposition, at 14, this Court may simply summarily dispose of this issue. FED. R. SUP. CT. 16.1.

III. The Conclusion—

[Omitted.]

Respectfully Submitted,



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Petitioner Pro Se

Dated: July 22, 1991

[Please note that page number one is a cover-page and that page twelve merely contains my signature, thus, this Reply Brief is within the ten page limitation.]

[*] The Petitioner is an attorney-and-counselor-at-law admitted to, and in good standing with, the Bar of the State of Ohio and the United States District Court for the Northern District of Ohio. He practices law as Richard G. Johnson Co., L.P.A.

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Dated: July 22, 1991

J. THE APPENDIX

I. Relator's Reply Brief, at 9-18 (footnotes renumbered)—

C. The Rebuttal—

1. The Introduction—

In his Statement of the Case section to his Merit Brief, the Relator set-out the following: (1) the Procedure on Original Action; (2) the Issues Presented; and (3) the Relevant Facts and Circumstances Below. Relator's Merit Brief, at 7-26. In his Statement of Facts section to his Brief in Opposition, the Respondent "adopt[ed] by reference, as if fully rewritten [t]herein, the Interven[ing] [Respondents'] Statement of Facts. Respondent's Brief in Opposition, at 1. In his Statement of the Case section to his Brief in Opposition, the Intervening Respondent, Salamon, "accept[ed] [the] Relator's Statement of the Case." Salamon's Brief in Opposition, at 1. Finally, in its Statement of the Case section to its Brief in Opposition, the Intervening Respondent, Prudential-Bache, "accept[ed] [the] Relator's Statement of the Case." Prudential-Bache's Brief in Opposition, at 1.

Since the Relator's Statement of the Case is uncontested by the Intervening Respondents—and in fact agreed to by them—the Relator simply finds it incomprehensible that they have both made arguments explicitly contradicting their double waivers.

a. Regarding the Respondent—

The Respondent has failed to brief in opposition almost every major argument raised in the Relator's Merit Brief, in apparent violation of OHIO R. SUP. CT. PRAC. V. § 2 (respondent shall answer the relator's contentions), choosing instead to dogmatically repeat the general rules of law voiced in his Motion to Dismiss the Relator's Petition. At the same time, the Respondent has articulated at most an unclear view of what mandamus is and how it is used. For instance, the Respondent tells this Court that "[a] proceeding in mandamus is a special proceeding *created* by statute." Respon-

dent's Brief in Opposition, at 6 (emphasis added). To the contrary, however, the writ of mandamus is a common law writ now codified by statute.[2] So much for erudition.

In his Statement of Facts section, the Respondent argued that the "Relator's arguments contained . . . [in his Relevant Facts and Circumstances Below section] are inappropriate and should be ignored by this Court." Respondent's Brief in Opposition, at 1.[3] In addition, the Respondent sniffed that although the Relator had failed to conform to this Court's rules regarding format, the Respondent would let this pass out of a sense of "professional courtesy" rather than moving to strike the Relator's Merit Brief. *Id.* Specifically, the Respondent whined that the Relator's Merit Brief illegally exceeded fifty (50) pages and that the Relator had not preceded his propositions of law with a sub-heading entitled "Proposition of Law Num-

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[2] State, ex rel. Selected Properties, Inc., v. Gottfried, 163 Ohio St. 469, 475, 127 N.E.2d 371, 374 (1955) (R.C. 2731.01 simply restates the common law); State, ex rel. Moyer, v. Baldwin, 77 Ohio St. 532, 537-40, 83 N.E. 907, 907-8 (1908) (mandamus is a common law writ defined in Ohio by statute; statute merely regulates the practice thereof; discusses history of mandamus statutes in Ohio; Ohio Constitution of 1851 confers original jurisdiction of mandamus in the Supreme Court—that jurisdiction was the common law jurisdiction as then exercised—General Assembly cannot enlarge or restrict that jurisdiction by statute); In re Turner, 5 Ohio 542, 543 (1832) (courts look to the common law to measure when to grant the writ of mandamus);

> [M]ost usual object sought by this writ is to exact the execution of some official duty from a ministerial officer; but it is equally applicable to compel courts to do that justice which the law enjoins them to administer. . . . by this process the superintending court can compel the performance of a duty by all the inferior tribunals, whether that duty by ministerial or judicial.

id.; *see generally* 67 OHIO JUR. 3D Mandamus, Procedendo, and Prohibition § 1 (1986 & Supp. Jun. 1990) (mandamus statute is just a restatement of the common law; courts look to the common law to see when it issues); *id.* at § 2 (mandamus is of ancient origin in English common law); *id.* at § 3 (early common law employed the writ to prevent a failure of justice).

[3] This from a Respondent who feigns displeasure at finding arguments hidden in the statement of facts. Moreover, the Relator assumed that the Respondent waived any objections thereto by incorporating the Statement of Facts of the Intervening Respondents, who themselves adopted the Relator's Statement of the Case.

ber ___."

First, the Respondent has never introduced any evidence in this Case. The Respondent has never objected to the Relator's Evidence. Now, at this late stage, the Respondent states that the Relator's Relevant Facts and Circumstances Below section of his Merit Brief is too long—and on that basis alone asks this Court to ignore it. Per usual, the Respondent has offered no authority for such an illegal suggestion. The Relator is sure that the Respondent would love to recede into a sterile fact pattern; however, this is not a sterile Case. Moreover, every statement and every word contained in the aforementioned Relevant Facts and Circumstances Below section has been supported by an Affidavit of the Relator or of Salamon. As such, that section is equivalent to written testimony admitted into evidence. OHIO R. SUP. CT. PRAC. VIII. § 7. This Court, sitting as the factfinder, can choose to believe or disbelieve any of this Evidence. However, this Court cannot ignore its existence. Were this a jury trial, the Respondent's argument, if made to the jury, would be grounds for a mistrial.

Second, the "*body* of the [Relator's Merit] [B]rief" shall be limited to "fifty [50] pages." OHIO R. SUP. CT. PRAC. V. § 1 (emphasis added). The word "body" means the argument of the brief, otherwise the Relator would be penalized for having to present the positive Statement of the Case. *Id.* at § 1 (D); *compare id.* at § 1 *and id.* at § 1 (A) *with id.* at § 2. The Argument section of the Relator's Merit Brief was only thirty (30) pages long. Relator's Merit Brief, at 27-57. How thoughtful of the Respondent not to move to strike the Relator's Merit Brief on such an erroneous basis.

Third, the "argument . . . shall be headed by the proposition of law which the . . . [Relator] contends is applicable to the facts in th[is] [C]ase and which, if he prevails, could serve as a syllabus. If several propositions of law are contended for, the argument shall be divided by utilizing each proposition as a subheading." OHIO R. SUP. CT. PRAC. V. § 1 (D) (citation omitted). As is facially obvious, the Relator's Merit Brief complies with this rule. Relator's Merit Brief, at 28, 31, 43, 51, and 52. Section 1 (D) does not require magic words of "Proposition of Law Number ___" to precede

the proposition of law. OHIO R. SUP. CT. PRAC. V. § 1 (D) (citation omitted). Apparently, by looking at the *sample* table of contents provided by this Court, *id.* at § 1 (A), the Respondent thinks that briefing to this Court is like a game of *Simon Says*, where without the magic preceding words of "Proposition of Law Number ___," this Court would read-over the Relator's Propositions of Law as if they did not exist.

Finally, the Respondent's most recent attack is made in the context of the Respondent having never previously complied with the format requirements of Rule V in regards to his filings with this Court. OHIO R. SUP. CT. PRAC. V. In his Brief in Opposition, the Respondent failed to number the pages in his Appendix, *id.* at § 1 (E); he again included an illegible copy of the Docket in the Case below—which he has never offered into evidence, OHIO R. SUP. CT. PRAC. VIII. § 7; he failed to list all of the attorneys of record on his cover page, OHIO R. SUP. CT. PRAC. VI. § 2 (F); he double-listed his table of authorities, OHIO R. SUP. CT. PRAC. V. § 1 (A and B); etc.[4]

b. Regarding the Intervening Respondent, Salamon—

The Intervening Respondent, Salamon, has again failed to offer a single authority for his authorization of his secretary to practice law for him; he has again refused to show any remorse for his conduct; he has never explained upon what basis he could have sought and received an *ex parte* judgment of sanctions against the Relator below for bringing up this issue; and after already losing his Motion to Dismiss the Relator's Petition, he again faithlessly asks for the same relief. Salamon's Brief in Opposition, at 1-10. Having painted himself into a corner, Salamon boldly walks across the wet paint with truly shocking indifference to legal ethics.

c. Regarding the Intervening Respondent, Prudential-Bache—

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4 The Respondent might remember that petty people ought to be perfect in their petty regards.

Prudential-Bache is just *so* smug. In the Relevant Facts and Circumstances Below section of its Brief in Opposition, it implied that the Relator's Complaint below is so unfounded that it will be dispatched with speed (in fact, Prudential-Bache called the Relator's Complaint "blatantly frivolous").[5] Prudential-Bache's Brief in Opposition, at 1 n.1. If this Court is really interested in that issue, and the controlling law of this Court holding that there *is* civil relief for perjury, the Relator would suggest that it read the Relator's Brief in Opposition to Prudential-Bache's Motion to Dismiss Counts Two through Five Inclusive or in the Alternative for a Partial Summary Judgment, which is contained in the Appendix to the Relator's filings with this Court of January 17, 1990. As is made apparent from that Brief, *Costell v. Toledo Hosp.*, 38 Ohio St. 3d 221, 527 N.E.2d 858 (1988), did NOT have any holding related to civil claims for perjury—all this Court need do to verify this fact is to read the Relator's aforementioned Brief and read the syllabus to that Case. OHIO R. REP. OP. 1 (B) ("syllabus[es] of . . . [this] Court['s] opinion[s] state[] the controlling point or points of law decided in and necessarily arising from the facts of the specific case before th[is] Court for adjudication"). As such, Prudential-Bache is blatantly lying to this Court.[6] OHIO CODE PROF. RESP. DR 7-102 (A) (5) (counsel shall not knowingly make a false statement of law).

Prudential-Bache *smugly* made the same sort of vacant jibes at the Relator as did the Respondent, and, of course, the same rebuttal applies. Prudential-Bache's Brief in Opposition, at 9. Like the Respondent, Prudential-Bache has never complied in the past with Rule V, OHIO R. SUP. CT. PRAC. V., and in its first attempt to do so, it did not list its counsels' attorney registration numbers, OHIO R. SUP. CT. PRAC. VI. § 2 (F); it did not delineate the Respondent's attorney, *id.*; it did not number the pages of its Appendix, OHIO R. SUP. CT. PRAC. V. § 1 (E); etc. Much like the Respondent, it seems that Pettiness and Hypocrisy deserve Prudential-

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5 Prudential-Bache might recall that it has been saying that it was going to dispatch the Relator's Complaint since May of 1989.

6 Indeed, in its Reply to the Relator's Brief below, Prudential-Bache admitted that it reliance on *Costell* was misplaced, and that the *Costell* court's discussion regarding perjury "may be dictum." Prudential-Bache's Reply, at 5.

Bache.

In its Prefatory Remarks section, Prudential-Bache called the Relator a "strange sort of individual," and attempted to "play smoothy" with this Court by "prefac[ing] its argument with a few cathartic explanatory remarks." Prudential-Bache's Brief in Opposition, at 7-9. To hear Prudential-Bache redundantly paint this *zeitgeist*, Prudential-Bache, its attorneys, and the Respondent, are just a bunch of hard-working, regular "guys" out to do their job in a kind and professional manner, always willing to cooperate, always the gentlemen. They might as well qualify for appearances in MICHELOB® commercials. Specifically, Prudential-Bache sighed that

> [a]ttorneys are busy and pressured people, working in a highly competitive environment. However, most members of the [P]rofession eventually learn that one can diligently and ably represent a client without seeking to tear out the throat of opposing counsel. Along with that recognition comes simple courtesy and fairness, and most attorneys practice such an approach in the interest of maintaining their personal and professional sanity.
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> . . . [the Relator] knows nothing of this. He is not a working attorney, having just taken the Ohio Bar Examination. More important, he is neither courteous nor fair, and as such, does things that would appall the great majority of lawyers.

Prudential-Bache's Brief in Opposition, at 7-8.

What bull! Let's remember that in this Case, Prudential-Bache (hypocrite that it is) drew first blood by calling the Relator a law student "who has spent the past seven months running amok through our legal system[,]" and it implied that this Court should consider the Relator's lack of character and fitness to practice law in this State. Intervening Respondents' Brief in Support of its Motion to Dismiss, at 4.

It has always been the Relator's position that litigation is to be avoided, but when commenced—it should be waged like war. It is not supposed to be easy and gentile. Prudential-Bache's view-point on litigation can be summed-up as the "lawyer's code of conduct;" lawyers simply do not call each other on their mistakes, and the result is a regression into mediocrity: sort of a lowest-common-denominator approach to the practice of law. This Case is but an example. Here, Prudential-Bache attempted to intervene under the wrong Civil Rule, admitted to intentionally withholding legal arguments from this Court, did not know it was supposed to file an Answer, and, most recently, apparently waived by mistake its objection to the Relator's Statement of his Case. Simply put, this continual sloppiness and inattention—and—yes—unprofessionalism—has been magnificently pointed out by the Relator. In the Relator's opinion, that is what the adversarial system is all about. And it says so much about Prudential-Bache's character that rather than cleaning up its act, Prudential-Bache has continued its sloppiness to this day, dripping all over its present Brief in Opposition.

The Relator, who besides being legally educated also holds an M.B.A. degree in finance, preceded this litigation with a rational-economic-approach. Centi-billionaire Prudential-Bache said get lost.[7] Prudential-Bache apparently believes that, after assuming that

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[7] Let's look at the *objective* pre-litigation settlement history of this Case, which is as follows:

By a letter dated February 15, 1988, the Relator, through his attorney, made claims against the Defendant Below, Barry P. Livingston, and advised him of the expected claims to be made against the Defendant Below, Gary A. Walker, as well as the Defendant Below, Prudential-Bache.

By a letter dated March 8, 1988, Prudential-Bache responded to the Relator's attorney as follows:

> This letter shall confirm our telephone conversation of March 7, 1988 regarding your client Mr. Johnson and his claims against Prudential-Bache and Barry Livingston.
>
> It is the position of Prudential-Bache Securities Inc. that neither your February 15, 1988 letter nor our recent discussion presents any recognizable theory of law or equity or cause of action upon which you can claim for damages from this company. You have failed to articulate a single basis which supports your rather vague and ambiguous allegations of impropriety against this firm and any and all such allegations are hereby denied by Prudential-Bache.

Similarly, with regard to your allegations made against Mr. Livingston, it is our opinion that you simply have no claim against Mr. Livingston. As discussed, it is our considered opinion there is no private right of action on a perjury claim. Furthermore, the allegations of impropriety with respect to the performance of the account have already been adjudicated in open court and the doctrines of res judicata and/or collateral estoppel apply. Although this firm does not serve as Mr. Livingston's counsel except for the purpose of this correspondence and our discussions on March 7, 1988, it is our opinion and recommendation that Mr. Livingston deny [any] and all such allegations.

In short then, this firm and Barry Livingston do not acknowledge any liability in this matter based on the information you have provided. We have yet to hear anything from you which would indicate that a valid theory of liability exists for Prudential-Bache Securities Inc. or Barry Livingston. Your request for remuneration is therefore denied.

By a letter dated October 12, 1988, the Relator wrote to Prudential-Bache's Pepper Pike, Ohio, Branch Manager, and demanded as follows:

I am in the process of preparing to file suit against your firm, and wish to make the following requests upon you in the hopes of saving us both a lot of time and trouble. To that extent, please provide the following at your very earliest convenience. Failure to do so may affect your firm's legal rights.

1. Please provide the name and address of your statutory agent in Ohio for service of legal complaints.

2. Please provide a copy of any account contract between your firm and Richard H. Brown (trustee of the above account) which contains an arbitration clause which might affect a legal complaint regarding the above account.

3. Please provide the name, address, and telephone number of any representative of your firm to whom pre-litigation settlement discussions should be addressed.

By a letter date November 11, 1988, the Relator made a pre-litigation settlement offer to Prudential-Bache in the amount of eighty-five thousand dollars ($85,000.00).

By a letter dated November 16, 1988, Prudential-Bache refused to provide the Relator with a copy of the alleged Customer Agreement and Arbitration Clause, and stated that "[i]t is Prudential-Bache's position that you are not entitled to any copies of account contracts entered into with Richard Brown. Therefore your request is denied."

And finally, by a letter dated November 21, 1988, the Relator advised Prudential-Bache that:

Should we enter into discovery, I will certainly be able to obtain any contracts and other correspondence between your firm and

its brokers mismanaged the Relator's trust account and committed criminal acts towards the Relator in relation to that account, it has no moral or legal responsibility to make amends. Throughout this litigation, the Relator has made repeated and continual and varied demands upon Prudential-Bache to settle this litigation, and he has made repeated and continual offers to discuss any counter-offers which might be proffered. Prudential-Bache has never responded to any of these concerns.[8]

Mr. Brown; said request was intended for your firm's benefit—not mine. I totally disagree that your firm can deny me access to any account information, including said contracts if they exist, because the account was in my name, e.g. "Richard H. Brown, trustee, f/b/o/ Richard G. Johnson." Moreover, failure to supply records which you have a duty to supply under the laws and regulations governing the securities industry, in my opinion would work as an estoppel against your firm should it wish to introduce them in its defense.

That demand was reiterated again on December 19, 1988 and on January 9, 1989.

[8] In a recent letter dated September 15, 1990, to Kent B. Schneider, Esquire, counsel for Prudential-Bache, the Relator summarized the settlement history of this Case as follows for Mr. Schneider:

Thank you for your letter to me dated September 13, 1990.

Let's review the settlement history in the above-referenced Case. On or about February 15, 1988, my previous attorney, Joshua J. Kancelbaum, Esquire, wrote a settlement demand letter to Barry P. Livingston. On or about March 8, 1988, Sandra A. Mohammed, Esquire, on behalf of Prudential-Bache Securities, Inc. ("Prudential-Bache"), wrote Mr. Kancelbaum a letter rejecting our settlement demand. On or about October 12, 1988, I wrote a letter to Lawrence G. Adelman demanding settlement of this instant liability. On or about November 11, 1988, I wrote a letter to Ms. Mohammed reiterating this settlement demand. On or about November 16, 1988, Ilana R. Marcus, Esquire, on behalf of Prudential-Bache, wrote me a letter rejecting these settlement demands. On or about November 21, 1988, I wrote Ms. Marcus a letter responding to her position. On or about December 19, 1988, I wrote Ms. Marcus another letter reiterating my demands. On or about January 9, 1989, I wrote Ms. Marcus yet another letter regarding settlement of this instant liability.

On or about April 24, 1989, I filed the Complaint in the above-referenced lawsuit.

On or about September 26, 1989, I wrote Jay H. Salamon, Esquire, a letter inviting settlement of your Client's liability to me. On or about February 2, 1990, I wrote a letter to Mr. Salamon reiterating

my invitation for a settlement of this matter. On or about February 18, 1990, I again wrote Mr. Salamon voicing a settlement demand. In phone conversations with Mr. Salamon on or about March 19 and 20, 1990, Mr. Salamon made an "offer" to me of five thousand dollars ($5,000.00), which I immediately rejected, and which he immediately then rescinded as not being authorized or serious. On or about March 24, 1990, I wrote Mr. Salamon a letter offering to settle a portion of your Client's liability. On or about May 9, 1990, I wrote Mr. Salamon a letter reminding him that he had not responded to my previous settlement demands or offers. On or about August 27, 1990, I wrote Mr. Salamon yet another letter offering to settle your Client's liability. On or about September 13, 1990, you wrote me a letter rescinding for the second time your Client's March "offer" of five thousand dollars ($5,000.00).

If your records are incomplete as to any of the above-mentioned correspondence, please let me know and I will provide copies to you of that material.

The above record reveals the following: prior to instituting the above-referenced lawsuit, your Client flatly refused to negotiate regarding its liability to me, choosing instead to flatly reject my claims. After instituting this lawsuit, I have continually and repeatedly offered to settle your Client's liability to me. I have made detailed, written settlement offers; and I have always invited counter-offers as well as general negotiation discussions. You and Mr. Salamon have never responded to a single settlement demand, you and Mr. Salamon have never responded to my offers to engage in settlement discussions, and you and Mr. Salamon have never made a counter-offer to me.

Let's look at your recent letter of September 13, 1990. In that letter, there is no response to my settlement demand. In that letter there is no counter-offer. In that letter, there is no offer to engage in settlement discussions. In that letter, you withdrew a settlement "offer" made and withdrawn by Mr. Salamon in March—which Mr. Salamon admitted at the time was neither serious nor authorized. Thus, I do not consider that to have been an "offer." Moreover, your invitation for me to call you to discuss the matter further is as incomprehensible as it is vague. Discuss what? As you should know by now, I am always ready and willing to meet you at your office and at your convenience to engage in settlement discussions. If that is what your vague and incomprehensible reference to discussions means, then you may simply call me to set-up an appointment.

It is my opinion that you, your Law Firm, and your Client, have never taken the above-referenced lawsuit seriously. Time and time again I have initiated attempts to allow your Client's extrication from this matter. Time and time again I have been ignored. As you

The objective settlement history in this Case reveals that throughout this affair, the Relator has done exactly what he was supposed to: he has initiated settlement offers, he has initiated offers to negotiate, and he has attempted to keep the lines of communication open. Prudential-Bache has done exactly what it should not have: it has refused to respond to settlement demands, it has refused to negotiate towards settlement, and it has carried this litigation off in a most sloppy and unprofessional way. All this "greedy" Relator wanted from Prudential-Bache initially was eighty-five thousand dollars ($85,000.00) to settle this Case prior to filing—surely Prudential-Bache has spent more than that fighting the Relator tooth-and-nail without ever even having the decency to negotiate at all. Prudential-Bache would have this Court view it as a sorry victim, however, the plain fact is that Prudential-Bache is just plain sorry. "Rock Solid—Market Wise!" *Indeed*![9]

Finally, this Court can now understand exactly what has polarized the Parties and prompted the Relator to such zealousness. Prior to filing the Complaint below, the Relator made reasonable requests upon Prudential-Bache to settle this litigation, but was re-

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know, I believe your Client's position and intransigence to be legally indefensible. Moreover, from a rational economic standpoint, I do not understand fighting claims that cost more to litigate than settle. In the past, Mr. Salamon has indicated that your Client does not feel that any of my claims are valid whatsoever. I would suggest to you that such a view is entirely unsupported by the record. In short, I have every intention of either winning procedurally or of getting to the jury on all of my claims. I honestly believe that all of my claims are valid and supported. I would also remind you that I have the resources, time, energy, and talent, to pursue these claims all of the way through the appellate process, if necessary. I fully intend to pursue my claims zealously. In light of all of the above, I honestly believe that your Client should be willing to settle its liability to me. I am *always* ready to entertain such discussions.

If you have any questions or comments, please feel free to call me.

Best regards.

9 The Relator cannot help but wonder exactly what type of advice its pastel *L.A. Law* Firm has been recommending. (Heck, if Prudential-Bache had hired the Relator to defend it from himself, it surely would have been ahead of where it is now.)

fused. The Relator demanded any arbitration contracts existing in the matter, but was refused. The Relator, a second-year law student at the time, spent months of legal research meticulously researching and preparing his Complaint. And then, immediately upon filing, he was hit with dual motions to stay alleging arbitration clauses by the Defendants Below. Zap! In effect, Prudential-Bache (as well as Shearson) breached and continued to breach its fiduciary duty to the Relator to provide to him the alleged account documents and statements, huffing instead that he was not entitled to them. Then, upon institution of the Complaint, Prudential-Bache attempted to ambush the Relator at the pass. It should not really be that hard for this Court to understand why the Relator holds Prudential-Bache in such contempt, or why the Respondent denied the motions to stay below (among over a dozen other reasons, waiver). What should really be hard for this Court to understand is Prudential-Bache's view that it acts with "courtesy and fairness." Prudential-Bache's Brief in Opposition, at 7. *Really*—Prudential-Bache is a lying, cheating, unfair, amoral, discourteous, arrogant, centi-billionaire, FORBES® 10 (assets) corporation—it does not even have a clue about "courtesy and fairness." It does not have a clue about customer relations, and it has no idea how to handle litigation with former customers from a business perspective. Obviously, Prudential-Bache has not looked in the mirror lately.